STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH A. BONDARENOK,

Plaintiff-Appellant,

v

KATHERINE A. NUSSBAUM and FORD MOTOR COMPANY,

Defendants-Appellees.

UNPUBLISHED
August 3, 2010

No. 290557
Wayne Circuit Court
LC No. 08-111729-NI

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

TALBOT, P.J. (*dissenting).*

I respectfully dissent from the majority opinion reversing the trial court's grant of summary disposition in favor of defendants. Specifically, I disagree with the majority's conclusion that the affidavit of plaintiff's expert, Gary Mattiacci, created a genuine issue of fact.

This cause of action involves a motor vehicle driven by defendant Katherine Nussbaum that collided with a bicycle ridden by plaintiff on June 8, 2006. At the time of the collision, road conditions were dry and it was still daylight. Defendant was driving northbound on Fort Street in the far left lane. All of the witnesses to the accident concur that plaintiff failed to yield to oncoming traffic and, despite her efforts to swerve, brake and avoid the collision, defendant's vehicle struck plaintiff. According to the police report, the front left side of defendant's vehicle impacted with plaintiff. At the point of collision, defendant's vehicle had swerved into the second lane from the left curb. Plaintiff received a citation from police for failure to yield. Defendant was not cited for the accident.

Contrary to all the witness statements, plaintiff contends that he stopped at the stop sign located in the median turn around and checked traffic before attempting to cross the northbound lanes of Fort Street. He asserted in his deposition that he had just entered northbound Fort Street when the accident occurred. It is undisputed that plaintiff was not wearing a helmet and tested positive for cocaine and had a blood alcohol level of .20 immediately following the accident.

Anthony Neal was a witness to the accident. Neal, an off-duty police officer, was driving behind defendant on northbound Fort Street. He contradicted plaintiff's version of events stating in relevant part:

> The white male on the bike continued to ride unsteadily. Looked like the bike, itself, was kind of wobbling back and forth from east to west. . . . He never looked to his left or to his right. . . . He just continued to ride straight into traffic.
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> * * *
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> He looked very unsteady on the bike. I could see him wobbling back and forth on the bike unsteadily, and obviously, you know, without talking to the person, I couldn't tell if it's because he's riding through the grass . . . or if it was because he was intoxicated . . . but it was very clear that he was unsteadily riding through the median without looking to his north or south.

Neal further indicated that he was "catching up" to defendant's vehicle and opined that she was not exceeding the speed limit. Neal specifically testified that he had "no doubt that the cause of the accident was this person failing to yield to traffic and riding directly in front of a car." Two other witnesses, Robert Gauvin and Patricia O'Neill, provided similar accounts of the incident to police, indicating that plaintiff failed to yield to oncoming traffic and proceeded into the roadway without looking. An investigating police officer reported that Gauvin stated that he "was south on Fort Street across from the White Castle's [sic] and saw a white male on a bicycle trying to cross Fort Street from west to east. . . . [T]he man on the bike drove right out in front of the car that hit him. He failed to yield for the northbound Fort Street traffic." Police officer David Grodin recounted the statements he obtained from these witnesses and indicated:

> I thought Mr. Gauvin said that it appeared the guy was intoxicated. . . . It just appeared that he purposely drove out in front of everybody on southbound traffic and didn't get hit, then drove through the median and got hit on the northbound side.

In addition, police officer Roy Bruce was at the accident scene and conducted various measurements pertaining to the location of defendant's vehicle, plaintiff's bicycle and their relationship to pertinent landmarks. Bruce determined that the entire width of the roadway at the location of the collision was 47 feet, with the individual lanes being 12 feet in width. The skid mark from defendant's vehicle was physically measured and determined to be 98 feet, six inches in length. While Bruce did not calculate the speed of defendant's vehicle, he determined plaintiff to be at fault for the accident because of his failure to yield to oncoming traffic.

In contradiction to the testimony of eyewitnesses to the accident, the police officers on the scene investigating the incident, and the undisputed physical evidence plaintiff's accident reconstruction expert, Gary Mattiacci, states in an affidavit his conclusions, which are in relevant part:

> 6. I have personally investigated the roadway. I have reviewed photos of the skidmarks and bicycle damage to determine the rate of speed of Defendant driver was driving at the time of the auto collision.
>
> 7. I have determined that Defendant's *vehicle's skid marks measured approximately 125 feet* thus leading to the determination that Defendant's speed was in excess of the posted speed limit 45 mph.

> 8. I have determined that Plaintiff's bicycle *using constant velocity traveled past the stop sign to the point of impact at 28 feet at an average of 11.76 to 14.47 feet per second* and that Plaintiff needed approximately 3 feet to clear or approximately .2 to .25 seconds to clear.
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> 9. I have determined that Defendant's vehicle would have been *approximately* a minimum of 16.08 feet further back from the point of onset of skidding had Defendant complied with the posted speed limit of 45 m.p.h.
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> 10. I have determined in my findings throughout my investigation of the collision scene that had Plaintiff had [sic] driven at the posted speed limit, the impact would not have occurred based on my *review of the road conditions, bicycle damage and skid marks*. [Emphasis added.]

The majority asserts that the content of this affidavit is sufficient to establish a genuine issue of fact precluding the grant of summary disposition. I disagree based on the failure of several assertions within the affidavit to comport with established facts in evidence or to comprise substantively admissible evidence.

Defendants sought summary disposition pursuant to MCR 2.116(C)(10), which provides: "Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In accordance with MCR 2.116(G):

> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.
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> * * *
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> (6) *Affidavits*, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)-(7) or (10) *shall only be considered to the extent that the content or substance would be admissible as evidence* to establish or deny the grounds stated in the motion. [Emphasis added.]

In accordance with MCR 2.119(B):

> (1) If an affidavit is filed in support of or in opposition to a motion, it must:
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> (a) be made on personal knowledge;

(b) *state with particularity facts admissible as evidence* establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, *can testify competently to the facts stated in the affidavit*. [Emphasis added.]

The mere production of a supporting expert does not prevent the grant of summary disposition. *Amorello v Monsanto Corp*, 186 Mich App 324, 331; 463 NW2d 487 (1990). To preclude the grant of summary disposition, it is necessary for plaintiff to establish the existence of a disputed fact by *admissible evidence*, MCR 2.116(G)(6) (emphasis added); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005).

I would note that Mattiacci's affidavit was signed and sworn to on January 21, 2009, more than 30 months after the collision occurred. In making his averments, Mattiacci indicates he viewed the roadway, but fails to indicate when that observation occurred and whether he can attest that the roadway and surrounding area/landmarks when inspected were unchanged from the date of the accident. In addition, Mattiacci does not indicate that he actually reviewed the file or physical evidence in this case, including the police reports, depositions, witness statements, etc. While Mattiacci attests that he "investigated the roadway," in determining the speed of defendant's car he indicates merely that he reviewed photographs depicting the skid marks and the bicycle damage. However, this is insufficient to determine speed, as the formula for estimating speed based on skid marks also requires the inclusion of the drag factor for the road surface and the braking efficiency of the vehicle.

The proffered affidavit is improperly conclusive. Mattiacci merely states he determined the skid marks to be 125 feet in length from a photograph we must assume was taken by someone else at a time closer to the accident's occurrence. Hence, it is not based on personal knowledge, is in direct contradiction of the physical evidence obtained at the time of the accident by the police officer having actually measured the skid mark and determining it was 98 feet and six inches in length, and provides absolutely no factual basis in support of his conclusion.

The affidavit contradicts plaintiff's deposition testimony. Plaintiff contends that he stopped at the stop sign before proceeding and was struck by defendant's vehicle almost immediately upon entering into the northbound lanes of the roadway. Yet, plaintiff's expert indicates that he used a "constant velocity" for plaintiff's bicycle in determining defendant's speed. This is not possible if plaintiff was stopped before entering the roadway and into the path of defendant's vehicle.[1] "[P]arties may not contrive factual issues merely by asserting the

[1] I would further note that the statements by eyewitnesses contradicting plaintiff's assertion of having stopped and looked before proceeding into the roadway does not alleviate the problem. While the eyewitnesses contend plaintiff did not stop, he was not traveling at a "constant velocity" based on the observation that he was "riding unsteadily" and was "wobbling back and forth."

contrary in an affidavit after having given damaging testimony in a deposition." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001) (citations omitted). Plaintiff's expert also indicates that plaintiff's bicycle traveled "past the stop sign to the point of impact at 28 feet." The uncontroverted evidence, based on the police officer's actual measurement of relevant distances and relationships to stationary landmarks at the accident scene, showed that each lane of traffic was 12 feet in width and that defendant's vehicle struck plaintiff's bicycle in the second lane of traffic at the left side of the lane. Given the measured distance of 12 feet in width for each lane, a distance of 28 feet to the point of impact as indicated by the expert's affidavit is inexplicably at odds with the evidence.

Contrary to the claims of the majority, the basis for my dissent is not focused on the format of the affidavit of plaintiff's expert, but rather on its questionable content and admissibility. Plaintiff's expert makes blatant and unsupported statements, which are contrary to the undisputed physical evidence. A party cannot simply submit an expert's affidavit based on fabrication in an effort to preclude summary disposition. Irrespective of the format of presentation, the bottom line remains that "[t]he expert's opinion must be admissible." *Amorello*, 186 Mich App 331. In order to "be admissible, the court must determine whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue, and the opinion must not tend to mislead or confuse." *Id.* at 331-332. "The facts and data upon which the expert relies . . . must be reliable." *Id.* at 332.

The affidavit of plaintiff's expert lacks any indicia of reliability as it is in direct contradiction of the facts and data in evidence and is even contrary to plaintiff's own testimony. Based solely on photographs of unknown origin, and a viewing of the roadway 30 months after the incident, Mattiacci has opined that defendant was speeding and, therefore, at fault for this accident. In stating this conclusion, Mattiacci's affidavit is devoid of any, let alone sufficient, factual support. As such, his averments cannot be construed to comprise anything other than rank conjecture and speculation.[2] It is well recognized that the provision of mere conclusory allegations that are devoid of detail is insufficient to demonstrate the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996). As a result, the affidavit of plaintiff's expert was insufficient to create a genuine issue of material fact regarding causation.

/s/ Michael J. Talbot

[2] I would note that I am not the first to find an affidavit submitted by this particular expert to be lacking and based on "pure speculation." See *Davis v Williams*, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2008 (Docket No. 278713).